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HANS KELSEN'S GOD AND THE STATE: The Theory of Positive Law as methodological Anarchism

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Abstract

This article situates Hans Kelsen's essay, *God and the State*, against the horizon of Bakunin's *God and the State*. This enables Kelsen's methodology to be revealed as a circumscription of Feuerbach's Left Hegelianism and its further radicalization in Bakunin. Kelsen's separation of law from any foundation other than in law itself prefigures the question of the relationship between law and life in contemporary Italian theoretical work on the notion of biopolitics. In place of a simple reversal of Kelsen's methodological procedure, the question should centre upon distinguishing law from life without repeating the opposition between the materiality of life and the abstraction of law prefigured in Kelsen's text.

Keywords

Anarchism, Bakunin, God, Kelsen, State.

Resumen

Este artículo pone la obra de Hans Kelsen, *God and the State*, en el horizonte de *God and the State* de Bakunin. Esto facilita a la metodología de Kelsen el hecho de manifes-

tarse como una delimitación del hegelianismo de izquierda de Feuerbach y su ulterior radicalización en Bakunin. La separación del derecho de Kelsen de cualquier fundamento diferente del derecho mismo prefigura la discusión sobre la relación entre derecho y vida en el estudio teórico italiano contemporáneo sobre el concepto de biopolítica. En lugar de una simple inversión del procedimiento metodológico de Kelsen, la discusión debería centrarse en la distinción entre derecho y vida, sin detenerse en la oposición entre materialidad de la vida y abstracción del derecho prefigurado en la obra de Kelsen.

Palabras clave

Anarquismo, Bakunin, Dios, Kelsen, Estado.

Introduction^{1*}

Hans Kelsen's *God and the State*, of 1922², is conventionally considered to be a text whose minor position and importance is determined by a process of theoretical development resulting in the *Pure Theory of Law: Introduction to the Problems of Legal Theory* (*Reine Rechtslehre. Einleitung in die rechtswissenschaftliche Problematik*), of 1934.³ The reconsideration of this text does not seek to directly place into question the minor status of this text in relation to this wider characterization of the path of Kelsen's theoretical development of a theory of positive law. Rather, it seeks to situate the text against the horizon of the explicit *and* implicit theoretical frameworks upon which Kelsen draws in order to construct the theory of positive law as methodological anarchism.

From this perspective, the explicit textual citation, reference and interpretative discussion of Durkheim, Feuerbach and Freud is supplemented by the consideration of the implicit presence of Bakunin in Kelsen's text. The introduction of Bakunin, as an implicit presence, derives, initially, from the identity between the title of Kelsen's text and that of one of Bakunin's final, posthumously published works, *God and the State*, 1882.⁴

1. * This article began as a seminar presentation to staff and graduate students at the Faculty of Law, University of Salerno. I am very grateful to Dr Valeria Giordano for the invitation to the participate in the seminar, and for the subsequent opportunity, at the invitation of *Soft Power*, to submit this article.

2. H. Kelsen, "God and the State", in H. Kelsen, *Essays in Legal and Moral Philosophy*, Springer, Dordrecht, 1973, pp. 61-82.

3. H. Kelsen, *Introduction to the Problems of Legal Theory*, Oxford University Press, Oxford, 1997.

4. M. Bakunin, *God and the State*, Dover Publications, New York, 1970.

The revelation of this identity then becomes the basis for the attribution of Bakunin's text as an 'intertext' within Kelsen's own text: the shaping of Kelsen's text by the implicit presence of Bakunin's text.⁵

The recognition of Bakunin as this intertextual presence provides the initial interpretative orientation for the detailed analysis of the argumentative structure of Kelsen's text. The elaboration of the position of methodological anarchism, with which Kelsen's text concludes, can then be situated as a reworking which circumscribes the tradition of Left Hegelianism (Feuerbach) with its political extension, or radicalization, in Bakunin.⁶

This level of analysis is then combined with the further questioning of Kelsen's text in relation to the methodological construction of "a *purely legal theory* of the state": "a *stateless theory of the state*".⁷ In this effect of methodological purification, the text can be considered, or, suggested to contain the prefiguration of the question of the relationship between law and life in contemporary Italian theoretical work orientated by the notion of biopolitics. This enables the methodological structure of Kelsen's text to be comprehended as the separation of law from life. Here, the purpose is not to pass to the simple reversal of Kelsen's methodological procedure, as the materialism of Feuerbach and Bakunin is not the origin which Kelsen's methodology obscures. Rather, the question becomes whether, and in what manner, it is possible to distinguish law from life without repeating the opposition between the materiality of life and the abstraction of law prefigured in Kelsen's text.

The initial methodological step: The psychological parallelism of the religious and the social

Part 1

The object of research is initially designated through the adoption of the insights of psychology in order to connect the concept of God with the concept of the state. The 'and' of God and the state is created by introducing the 'parallelism' or analogy which psy-

5. The notion of intertext is utilized here with the limited purpose of opening the possibility for a particular interpretative approach this specific text of Kelsen, and the question of the subsequent trajectory of Kelsen's theory of positive law. It does not seek to enter into the further theoretical questions which arise from the notion of intertextuality developed in the early work of Kristeva. See, in particular, J. Kristeva, "The Bounded Text" and "Word, Dialogue, and Novel", both in J. Kristeva, *Desire in Language: A Semiotic Approach to Literature and Art*, Columbia University Press, New York, 1980, pp. 36-63 and pp. 64-91.

6. On the origin of Bakunin's thought in Left Hegelianism, see the excellent examination in J.-C. Angaut, *Bakounine jeune hégélien. La philosophie et son dehors*, ENS, Paris, 2007.

7. H. Kelsen, "God and the State", p. 81.

chology identifies between the religious question and the social question: the individual's experience of God (the religious) and the individual's experience of society (the social).

The parallelism or analogy commences from the "consciousness of a supraindividual authoritarian being."⁸ At this level, psychology holds that there is no essential difference between the normative authority of God, through the possession of "the soul of the individual", and the claim of unconditioned obedience "with which society enters into [the individual] consciousness."⁹

This consciousness of a supraindividual authoritarian being contains the elements of dependence and subordination, but Kelsen also introduces further complexity into this parallelism. Psychology is utilized to disqualify the claims of theology relating to the position and authority of God, as there is "no psychical phenomenon having absolute power, efficacy or intensity."¹⁰ This deflation of theology is the corollary of the psychological acknowledgement of the capacity of society –mere social authority– "to [compel] men against their deepest instincts."¹¹

The complexity of this psychological phenomenon is increased by the acknowledgement that dependence and subordination, as the effect of the consciousness of a supraindividual authoritarian being, is accompanied by the "complementary idea of an authority creating the social nexus."¹² While this is evident at the social level, as the basis upon which "the social group takes root in individual consciousness"¹³, the acknowledgement of this, at the religious level, extends the question of the initial parallelism to the relationship between authority and community.

In this extension, the religious community, as the "universal interconnection" –"an intimate communion between [the individual] himself and all other beings imbued with the spirit and will of God"– reveals a underlying pantheistic logic of cosmic community, of merger "into a single being."¹⁴ The dynamic of religious experience removes the sense that the logic of the social and the religious are opposites (religious: community to authority social: authority to community). For Kelsen, authority and community are "not two distinct objects", "merely different stages in the mind's progress, which are not successive in only one way."¹⁵

8. Ibid., p. 62.

9. Ibid., p. 61.

10. Ibid., p. 62.

11. Ibid.

12. Ibid., p. 61.

13. Ibid.

14. Ibid., p. 62.

15. Ibid.

The further development of the methodological insights of this parallelism confronts a potential limit in the comparative parameters of the cosmic community and social community. The cosmic community, predicated upon the indistinction of nature and society, "embraces all objects whatsoever, organic and inorganic alike."¹⁶ The human community is "confined to men, and is merely a human association."¹⁷

The limit is overcome by acknowledging the dual concept of God which contains both the notion of highest purpose and the notion of absolute good. From this acknowledgement, there arises a further displacement of the theological understanding of God by anthropology. Here, the primacy of the mythological comprehension of God is the origin from which all further notions of the dual concept of God arise, and, in relation to which, Kelsen identifies a process of secularization.

The origin in mythology enables a comprehension of the "intimate relation between the religious and the social pattern."¹⁸ For, the essential indistinction of mythology "between the ethico-normative and a natural cause" reveals a generalized normativity in which "the essential dividing line between man and the rest of nature disappears."¹⁹ In this attribution of human behaviour to things, in which nature is itself a society, there is a universal system of norms which have as their content the behaviour of all things and hence make all things into "men", i.e., into men in the ethico-normative sense of "persons" or recipients of norms.²⁰ This comprehension of original normativity is dissolved in the process of secularization which Kelsen attributes to the passage from myth to science. The transformation of myth to science results from the reorientation of the questioning of "the behaviour of things" – from "why they should so behave, or be obliged to so to do" to "the effect of a cause": the purification of the conception of causality from the idea of a command directed to, or aiming at, the effect.²¹

This dissolution renders the ethico-normative level increasingly marginal with the generalization of this scientific concept of causality from nature "to men as well."²² The original indistinction between society and nature of mythology is replaced with another form of indistinction in which

16. *Ibid.*, p. 63.

17. *Ibid.*, p. 62.

18. *Ibid.*, p. 64.

19. *Ibid.*, p. 63.

20. *Ibid.*

21. *Ibid.*

22. *Ibid.*, p. 64.

society so far as it is regarded as an aggregate of actual, causally determined modes of behaviour among men, becomes transformed into nature, into a branch of nature not essentially to be distinguished from other parts of the universal causal order of things. And only insofar as consideration directed to the social maintains itself as an ethically (or juristically) normative viewpoint, can society be constituted as an object distinct from nature.²³

Kelsen, therefore, insists that in order to retain the insights of the psychological parallelism of religion and society, access to this origin be retained by re-centring consideration upon “the original ethico-normative meaning” of God as opposed to an exclusively causal conception of God.²⁴ From this re-centering, the parallelism is retained, as it remains comprehensible that “[t]he essence of the religious experience involves a social element [and] the essence of the social experience a religious one”²⁵: “[t]he two orders in fact coincide, since for the primitive his kind is identical with God, or ranks at least as the representative, the son, servant or instrument of God, and his command as God’s will.”²⁶

Part 2

The co-implication of religious and social experience, which this psychological parallelism reveals, provides the transition to the consideration of Durkheim, Feuerbach and Freud. In this approach, Kelsen’s approach breaks with a strictly chronological approach by situating Durkheim prior to Feuerbach in order to utilize Feuerbach to extend, and deepen further, this initial parallelism. The final move to Freud’s *Totem and Taboo*²⁷ then enables Kelsen to pass from psychology to psychoanalysis in which Freud assumes the position of the psychoanalytic ‘origin’ of the Durkheimian and Feuerbachian enquiries into the psychology of religious experience.

Durkheim’s *The Elementary Forms of Religious Life*²⁸, and, in particular, the notion of totemism, generated from “psychological enquiry into the facts”²⁹, indicates that “the

23. Ibid.

24. Ibid.

25. Ibid.

26. Ibid.

27. S. Freud, *Totem and Taboo*, in J. Strachey (ed.) *The Standard Edition of the Complete Psychological Works of Sigmund Freud, Volume XIII (1913-1914): Totem and Taboo and Other Works*, Hogarth Press and the Institute of Psychoanalysis, London, 1955, pp. vii-162 (Kelsen refers to the 2nd German edition published by Internationaler Psychoanalytischer Verlag, Leipzig-Wien-Zurich, pp. viii-216).

28. E. Durkheim, *The Elementary Forms of Religious Life*, The Free Press, New York, 1995.

29. H.Kelsen, “God and the State”, p. 64.

religious experience is exhaustively describable as the social, and that in the element of authority and community which is equally essential to religious and social experience alike, no difference of content is discernible in either case.”³⁰ Feuerbach’s *The Essence of Religion* (1845)³¹ then extends the equality of religious and social experience, from a psychological standpoint, to indicate that there is “no special religious feeling, no special religious sense, and consequently no special religious object either, to which the religious experience is wholly and solely related, or religious veneration directed.”³² Hence, from the psychological standpoint, there is no essential difference between “the worship of God and the worship of idols,” nor between “reverence for heroes and princes [...] [and] the adoration of the deity.”³³

These initial indications, from the psychological standpoint, in Durkheim and Feuerbach, of the “similarity of the religious and social attitudes” find their origin, for Kelsen, in Freud: the “elementary psychical experience” of “the child’s relationship to his father.”³⁴ This primary (primal) experience of paternal authority is the origin of the experience of every subsequent authority “as father.”³⁵ The structure of paternal authority, in its psychoanalytical comprehension, is “equivocal”, as the drive to self-subjection “which in some way aims at pleasure is at the same time the wish to subject others to oneself.”³⁶ This, again, leads Kelsen to the insistence that there is no “special psychology of the religious man, for in fact it is simply the psychology of social man.”³⁷

The continued insistence on the psychological parallelism is accompanied by a more complex presentation of “self-subjection under the authority of the group.”³⁸ Here, equality of subjection to the authority of the group is the experience of indirect mastery, through subjection to the individual member’s chosen authority. The individual group member’s indirect authority, is not simply the acknowledgement of (common) subjection, but the authority which the individual derives from group membership. This introduces a structure of complementarity between self-subjection and exaltation of the group. Hence,

30. Ibid., pp. 64-65.

31. L. Feuerbach, *The Essence of Religion*, Prometheus Books, New York, 2004.

32. Ibid., p. 65.

33. Ibid.

34. Ibid.

35. Ibid.

36. Ibid., p. 66.

37. Ibid.

38. Ibid.

[j]ust as the primitive at certain times, when he dons the mask of the totem animal which is the idol of his tribe, may commit all the transgressions which are otherwise forbidden by strict norms, so the civilized man, behind the mask of his God, his nation or his state, may live out all those instincts which, as a simple group-member, he must carefully repress within the group.³⁹

The logic of this form of approach, however, is metaphorically a “stripping of masks” to reveal “men putting coercion on other men”⁴⁰:

this discounting of the masks, this looking through them to the naked, naturally necessary, causally determined motions of souls and bodies, is the viewpoint adopted by a scientifically orientated psychology and biology. From it one sees neither religion, nor the nation, nor the state. For these are simply the ‘masks’, the specific ideologies which arise upon the foundation of the real facts; ideal systems of value-relations or norms which the human mind creates for itself, and into whose own immanent schemes of law one must enter and install oneself, in order to be vouchsafed any of those objects that are referred to as religion, the nation, the state, etc.⁴¹

The “final methodological insight” is the critique of the attempt, in the further development of psychological parallelism, to reduce the social to nature. The application of the language of cause and effect, in which “an expression of will on the part of one organism should become a cause of the behaviour of another”, is in its generality, the impossibility of a “specifically social meaning.”⁴²

A specifically social meaning entails detaching oneself from the scientific, psychological standpoint, and attributing an independent existence to these “masks” of God and the state. This, in turn, involves the attribution of an initial coincidence of God and the state: “the national God is simply the deified nation in a personified form.”⁴³ The subsequent separation, exemplified by Christianity, involves the “separation of the concept of God from the national community.”⁴⁴ In this separation is contained “a

39. Ibid., pp. 66-67.

40. Ibid., p. 67.

41. Ibid.

42. Ibid.

43. Ibid., p. 68.

44. Ibid.

supranational God” and “a consciousness of mankind.”⁴⁵ From this separation emerges “the idea of a society above the state, a community of all men which bursts the bounds of the individual state.”⁴⁶ Yet, this “cosmopolitan God of Christianity” exists with the “multitude of other Gods” of other nation states. For, the co-belonging of the social and the religious is expressed in the triad people-national feeling-God. This triad provides the concluding parallel between religion and the social, and the passage to the consideration of the question and response to the theory of the state through its parallels in the theology.

The final methodological step: From psychological parallelism to the critique of knowledge

The passage to the theory of the state and its parallels in theology, involves the transition from psychology to epistemology, in the form of a critique of knowledge. In this passage, the psychological parallelism is replaced with parallelism in “the abstract idea of the unity of this order [which] seeks an intuitive expression for itself in the anthropomorphic mental aid of personification.”⁴⁷ The transition from a parallelism established by psychology to one established by a critique of knowledge reflects the effect of the preceding engagement with Vaihinger’s *Die Philosophie des Als Ob*⁴⁸ in Kelsen’s article, of 1919, entitled “Zur Theorie der juristischen Fiktionen.”⁴⁹ Kelsen adopts a qualified acceptance of Vaihinger’s notion of a fiction in which the central importance of this notion, for a critique of knowledge, is recognized while insisting upon the requirement for a more refined and precise formulation of the Vaihingerian notion of a fiction, as a specifically ‘legal fiction’, within the field of law.

The connection between *God and the State* and *Zur Theorie der juristischen Fiktionen* derives from the first part of *Zur Theorie der juristischen Fiktionen* in which Kelsen specifies the character and operation of the ‘legal fiction’ in a science or theory of law.⁵⁰ This character and operation, within a theory of law, is to be “clearly distinguished” from that

45. Ibid.

46. Ibid.

47. Ibid., p. 69.

48. H. Vaihinger *Die Philosophie des Als Ob. System der theoretischen, praktischen und religiösen Fiktionen der Menschheit auf Grund eines idealistischen Postivismus. Mit einem Anhang über Kant und Nietzsche*², Felix Meiner Verlag, Leipzig, 1913. This is the edition to which Kelsen refers rather than the 3rd Edition of 1918.

49. H. Kelsen, “Zur Theorie der juristischen Fiktionen. Mit besonderer Berücksichtigung von Vaihingers Philosophie des Als Ob”, in *Annalen der Philosophie und philosophischen Kritik*, I, 1919, pp. 630-658.

50. H. Kelsen, “Zur Theorie der juristischen Fiktionen”, pp. 630-638.

which underlies the fictions utilized by “the *legislator* and by *those who apply the law*.”⁵¹ For, it is within a theory of law that the Vaihingerian notion of a fiction can be held to inform the emergence and existence of specifically legal fictions. The Vaihingerian notion of a fiction, as an object created by the imagination, is an essentially heuristic device which enhances the comprehensibility of a particular field of knowledge.⁵² The fiction, therefore, has a distinct status, as means of cognition which is continually open to the risk of being confused with an object of cognition. It is this risk –hypostatization– which a theory of knowledge both recognizes and seeks to limit by insisting upon the maintenance of fictions strictly within the parameters of a *means* of cognition. The theory of knowledge becomes a critique of knowledge to the extent that a particular field, or a particular fiction within a field, is subject to a lack of clarity over the status of fictions.

In *God and the State*, Kelsen emphasizes that the critique centres upon the confusion “between a means and an object of cognition” in which

the personification is hypostatized, i.e., what was merely a tool for grasping the object is taken for a real object; but in this way the object of knowledge is duplicated, and hence is created the pseudo-problem of the relationship of the two entities, where at bottom only the unity of one and the same object should come to be expressed.⁵³

In application of this critique to the personification of the state, the state is to be understood as “merely the personification of an order: the legal order.”⁵⁴ For Kelsen, “the object of legal cognition is only the law and nothing but the law, and to conceive the state legally –which is the purpose of constitutional law theory (*Staatsrechtslehre*)– can only mean to conceive the state as law.”⁵⁵ If the personification of the state assumes the form of hypostatization, then, for Kelsen, the theory of state produces “exactly the same problem –or pseudo-problem– situation as in theology.”⁵⁶ The “existence of a supernat-

51. Ibid., p. 638. The italics are those of Kelsen (English translation by Peter Langford).

52. The shaping of Vaihinger’s notion of fictions by the wider neo-Kantian orientation of his thought is to be sought in the particular interpretation of Kant’s *Critique of Pure Reason* which Vaihinger offers in the two volumes of his *Kommentar zu Kants Kritik der reinen Vernunft* published in 1881 and 1892 respectively (both volumes were then published together in a single volume: H. Vaihinger, *Kommentar zu Kants Kritik der reinen Vernunft*, Union Deutsche Verlagsgesellschaft, Berlin-Leipzig-Stuttgart, 1922).

53. H. Kelsen, “God and the State”, p. 69.

54. Ibid.

55. Ibid., pp. 69-70.

56. Ibid., p. 70.

ural God above and beyond the universe”, thus finds its parallel in “the transcendence of the state vis-à-vis the law, in the existence, or more exactly the pseudo-existence, of a metalegal, supralegal state.”⁵⁷

The parallelism is evident in the notion of state sovereignty – “If the sovereignty of the state is interpreted as a power, so power it is likewise which every theology declares to be the essence of its God, and which, exalted to absolute omnipotence, is also proclaimed of the state.”⁵⁸ This omnipotence has, initially, a normative sense – “the legal order can incorporate any desired content” – but has the tendency to proceed to naturalization: “to confuse the power of the state, which as a legal power is a potential for validity, with a natural source of efficacy, a psycho-physical force.”⁵⁹ From the epistemological perspective of legal cognition, “two mutually distinct and independent systems, God and the world, the state and the law, make their appearance within one and the same sphere of knowledge, whereas the inherent tendency of all knowledge is towards systematic unity.”⁶⁰

This perspective enables the difficulty or problem to be conceived as “the common pseudo-problem of the relationship between a system and its hypostatization (a relationship being conceivable only *within* the system)” with the same “solution.”⁶¹ The “solution” entails the notion of “self-limitation and self-obligation” of God and of the state.⁶²

The separation of law and state is situated within a unity by the transformation of “a logical postulate” “into a political postulate.”⁶³ In this transformation, the notion of unity is transformed from that of necessity to that of contingency – historical development with its conclusion in “the modern constitutional state.”⁶⁴ For Kelsen, unity can only be conceived “as a conceptual reality, independent of all historical development, the union of state and law can be no historical fact, and every state, even the absolute police state, must be a legal order.”⁶⁵

The dualism of state and law is both “a contradiction in the logically systematic sense and the source of a political-legal abuse.”⁶⁶ At this level, “it becomes the dualism of two

57. Ibid.

58. Ibid., p. 71.

59. Ibid.

60. Ibid., p. 72.

61. Ibid., p. 73.

62. Ibid.

63. Ibid., p. 75.

64. Ibid.

65. Ibid.

66. Ibid.

different and mutually contradictory norm-systems, of which one, under the names of 'state', reason or interest of state (also public welfare, public 'law'), is then repeatedly brought to bear whenever the other, namely 'positive' law, leads to a consequence unwelcome to the rulers, who are in truth identical with this 'state'.⁶⁷

Here, for Kelsen, the question of imputation arises. The question of the nature of the state, from the perspective of legal cognition, becomes "under what conditions is a human action (and only the acts of individuals are initially there to be explained) to be attributed, not the agent himself, but to an entity, the state, conceived to be 'behind' him, under what conditions are human acts to be interpreted as acts of state?"⁶⁸

For legal cognition, "the criterion for ascription to the state can only be a legal one."⁶⁹ Hence, an individual action can be comprehended as an action of the state if and only if "it is qualified in a specific manner by a legal norm, [and, therefore,] if decreed in the system of the legal order."⁷⁰ Imputation, as legal cognition of an individual action as an action of the state, "is simply an expression for the unity of this order, the legal order. To apprehend an act legally, especially an act of state, is to apprehend it as a determinately qualified content of the legal order."⁷¹

Legal cognition, in its separation from politics, and, in particular, through the notion of imputation, reveals that those acts "not covered by the legal order" and ascribed to the state as "an order different from the positive legal one" must then construe "law out of non-law, and a legal act out of a naked act of power."⁷² The possibility of unity—as "the juxtaposition of two systems independent of each other"—"an excursion beyond nature", "a supernatural order of the divine will beyond nature", reveals the parallelism in method of theology and of state-theory.⁷³ For Kelsen, "the method of state-theory, which, with its suprallegal system of a meta- or supra-legal state distinct from the system of law, endeavours to render the legally unintelligible intelligible nonetheless—in a legal manner—and to secure belief in a legal miracle, exactly as theology does with a natural one."⁷⁴

The revelation that this "other-than-legal-state" is "merely the expression of certain political postulates extending beyond the positive legal order", then leads to the further

67. *Ibid.*, pp. 75-76.

68. *Ibid.*, p. 76.

69. *Ibid.*

70. *Ibid.*

71. *Ibid.*

72. *Ibid.*, p. 77.

73. *Ibid.*, p. 78.

74. *Ibid.*

parallelism of the presence of wrong within the “unitary person of the state”⁷⁵: the simultaneous capacity for the state to will “both law and its negation.”⁷⁶ This introduces the parallelism with the theological problem of theodicy: “How can God, whose will is goodness, will sin and evil? And yet evil, too must be ascribed to Him, for nothing is possible without His will.”⁷⁷

The final parallelism is revealed in “the relationship between *God and man*, or *state and individual*.”⁷⁸ Here, the presence of man as a soul – “a spiritual being”, “made in the image of God”⁷⁹, finds its parallel, in the “person” of the “a specifically legal entity” created “after the image of the state.”⁸⁰ For Kelsen, it is “the aim of religious and political thinking alike to restore unity between the two opposite poles, and to portray their duality as really a unity”⁸¹, and this parallelism of aim is reflected in a parallelism of ‘solutions’: “either we start from the isolated individual in order to have him absorb the universe, or we start from the universe so that it may swallow up the individual. Individualism and universalism are the two primary schemata for religious and political theory [...]”⁸²

This parallelism leads Kelsen to consider the opposing parallelism of “*atheism and anarchism*”⁸³ – the negative answer to the existence of God and state. Here, Kelsen regards both positions as separable into a critique of knowledge and an ethico-political position, and it is this separability which distinguishes Kelsen’s critique of knowledge, as legal cognition, from the ethico-political variants of both atheism and anarchism. Kelsen defines his position as that of a methodological or “epistemic” atheism and anarchism.⁸⁴ The methodological position confines negation to cognition, but does not proceed to the question, which is the ethico-political one, of whether God or the state *ought* to exist.

The limitation to methodological or epistemic anarchism – “a reduction of the concept of the state to the concept of law” – produces “a negative ethico-political effect.”⁸⁵ It dissolves the concept of the state as “an absolute reality”, and, in this dissolution, pro-

75. Ibid.

76. Ibid.

77. Ibid.

78. Ibid., p. 79.

79. Ibid.

80. Ibid.

81. Ibid., p. 80.

82. Ibid.

83. Ibid.

84. Ibid., p. 81.

85. Ibid.

duces the awareness that the “state is a human artefact, made by men for men, and hence that nothing can be deduced *against* man from the nature of the state.”⁸⁶ It demonstrates that the state is a legal order “whose content is changeable and can always be changed, and thus concedes to the state no other criterion beyond the formal character of a supreme coercive order.”⁸⁷ In this, effect, however, it remains a negative theory, a “*pure theory of law*”, as it merely undermines “one of the most politically effective obstacles which at all times has been laid in the path of reforming the state in the interests of the ruled.”⁸⁸

The “*purely legal theory of the state*”, as a “*stateless theory of the state*”, resulting from the critique of knowledge, produced by legal cognition, is, for Kelsen, the sole path from theology to science.⁸⁹ This path, is the passage from substance to function in which “the reduction of the suprallegal concept of the state to the concept of law [is] the indispensable precondition for the development of a genuine science of law, as a *science of positive law* purified of all natural law.”⁹⁰ Here, the pure theory of law is a pure theory of the state, “because a theory of the state is possible only as a theory of state-law, while all law is state-law, because every state is a legal state.”⁹¹

The methodological limitation of ethico-political anarchism: Bakunin in the text of Kelsen

The appearance of anarchism in the final part of Kelsen’s, and the methodological regulation of its negation of God and the State, indicates, together with the same title of Kelsen’s text and that of Bakunin’s posthumous text, indicates the potential for the recognition of the implicit presence of Bakunin, as intertext, within Kelsen’s text.

The methodological regulation, as the limitation of the critical aim of legal cognition to ‘epistemic anarchism’, when placed into relation with Bakunin’s text, enables a fuller comprehension of its effect upon the materialism which underlies Bakunin’s anarchism. The detachment, by Kelsen, of the epistemic from the ethico-political, undermines the unity which Bakunin holds to exist, between the faculties of “*the power to*

86. Ibid.

87. Ibid.

88. Ibid.

89. Ibid.

90. Ibid., p. 82.

91. Ibid.

think and the desire to rebel."⁹² This, in turn, affects their expression, as the progressive development of the social world, by negation: the "deliberate and gradual negation of the animal element in man [which as both natural and rational] constitutes and creates the ideal, the world of intellectual and moral convictions, ideas."⁹³

Kelsen's methodological precautions reduce Bakunin's "three essential conditions of all human development"⁹⁴—human animality, thought and rebellion—to thought alone as science. The reduction is then accompanied by an internal distinction, within the sciences, between natural—psycho-biological—and legal science. Kelsen thereby detaches legal science from any association with the natural laws, and their associated development, of the natural sciences. This dissociation necessarily affects Bakunin's insistence upon the "inevitable power of the natural laws which manifest themselves in the necessary concatenation and succession of phenomena in the physical and social worlds."⁹⁵ For, it disconnects these natural, inherent laws from any necessary connection with their recognition and application "on an ever extending scale in conformity with the object of collective and individual emancipation or humanization which he pursues."⁹⁶ Rather, for Kelsen, the purpose of science, of which legal science is an aspect, is the transition from the language of substance to the language of function—the purification of the conceptual language of the particular science from any potential parallelism with theology. In this transition, the effect of the recognition and application of scientific language is limited to the particular science itself.

The primacy which Kelsen accords to the critique of knowledge and, in particular, legal cognition, conceives the transition from the parallelism of theology and the theory of the state to reside in the correct understanding of personification. The attribution of a substantive identity to a concept is the misrecognition—hypostatization—of the concept. This is then to be contrasted with its scientific recognition as a purely functional term whose purpose is to encapsulate the unity of a particular order.

In contrast, the foundation of Bakunin's critique in materialism, entails that science is the "mental reproduction, as well-considered and systematic as possible, of the moral laws inherent in the material, intellectual, and moral life of both the physical and social worlds, these two worlds constituting, in fact, but one and the same natural world."⁹⁷

92. M. Bakunin, *God and the State*, p. 9.

93. *Ibid.*

94. *Ibid.*, p. 12.

95. *Ibid.*, p. 28.

96. *Ibid.*, p. 29.

97. *Ibid.*, p. 34.

This critique is also an immediate critique of authority, as it distinguishes this science of materialism which is “in harmony with human liberty”, from all other forms of authority which are “false, arbitrary and fatal.”⁹⁸

In place of the demonstration of the Kelsenian parallelism between theology and the theory of the state, Bakunin’s materialism demonstrates that the theological presupposition of God arises from idealism. In the exemplary form of Christianity, this idealism, constitutes itself through the reversal of materialism. The content of the natural and social world is defined as empty and imperfect in relation to the absolute and eternal concept of God. The opposition of an absolutely positive God and an absolutely negative world is solely a product of thought, but the logic of personification, is, for Bakunin, only an element of its “moral and social utility.”⁹⁹ The belief in God –the “triumphant stupidity of faith”¹⁰⁰– rests on the avowal of that the individual is God’s “creature and slave.”¹⁰¹ The connection between God and the State, results from the question of how belief is to arise within a world which is essentially negative. The representation of God’s presence/existence is through revelation, and it is from this dependence of belief upon revelation that institutions first arise.

For Bakunin,

whoever says revelation says revealers, messiahs, prophets, priests and legislators inspired by God himself: and these, once recognized as the representatives of divinity on earth, as the holy instructors of humanity, chosen by God himself to direct it on the path of salvation, necessarily exercise absolute power. All men owe them passive and unlimited obedience; for against the divine reason there is no human reason, and against the justice of God no terrestrial justice holds.¹⁰²

Hence, “[s]laves of God, men must also be slaves of Church and State, *insofar as the State is consecrated by the Church.*”¹⁰³

The reference to the implicit, intertextual presence of Bakunin in Kelsen’s text, enables the extension of the field or parameters of interpretation of Kelsen’s text in order

98. Ibid.

99. Ibid., p. 13.

100. Ibid., p. 15.

101. Ibid., p. 24.

102. Ibid.

103. Ibid.

to situate it in relation to Carl Schmitt and Walter Benjamin. In this manner, Kelsen's text can be seen to be in a middle position between Schmitt and Benjamin. In relation to Carl Schmitt, Kelsen's position is to be contrasted with the explicit and total rejection of Bakunin in the final section of Carl Schmitt's *Roman Catholicism and Political Form* (*Römischer Katholizismus und politische Form*) of 1923.¹⁰⁴ Schmitt accords Bakunin the position of fundamental negativity, as the "naive berserker who was generations ahead of his time in the battle against the idea and the spirit"; and it is this position which prefigures the present economic-technical thinking, in which "[n]either persons nor things require a 'government'."¹⁰⁵ The prefigurative position which Bakunin occupies, extends to Bakunin's identification of the source of the "two great masses opposed to West European tradition and education"¹⁰⁶, and, against which, the Roman Catholic Church must replicate its oppositional position of "first half of the nineteenth century": "that remote skirmish with Bakunin."¹⁰⁷ In relation to Walter Benjamin, Kelsen's position is to be contrasted with the more diffuse, but nonetheless explicit filiation of an aspect of Benjamin's theoretical work with the anarchism of Bakunin.¹⁰⁸ This is evident, for example, in the 1929 essay on 'Surrealism', where the surrealists are attributed with a "radical concept of freedom" which, "[s]ince Bakunin, Europe has lacked": "They are the first ones to get rid of the liberal, moralistic-humanistic sclerotic ideal of freedom."¹⁰⁹

This elaboration of the position of methodological anarchism, with which Kelsen's text concludes, can then situate this middle position as a reworking which circumscribes the tradition of Left Hegelianism (Feuerbach) with its political extension, or radicalization, in Bakunin. The political effects of Kelsen's 'epistemic anarchism' are those of the effect of the critique of knowledge: confined to undermining the understanding of the concept of the state as "an absolute reality."¹¹⁰

104. C. Schmitt, *Roman Catholicism and Political Form*, Greenwood Press, Westport (Ct.), 1996.

105. *Ibid.*, p. 36.

106. *Ibid.*, p. 38.

107. *Ibid.*, p. 39.

108. The question of Benjamin's political position is, of course, complex, and it is not the intention here to seek to reduce it to a single source and to attribute this source to Bakunin. Rather, it is to indicate the distinctly different receptivity of Benjamin to Bakunin. The question of the wider relationship between Schmitt and Benjamin is also left deliberately unexamined by this comparison with Kelsen.

109. W. Benjamin, "Surrealism: The last snapshot of the European intelligentsia", in W. Benjamin, *Reflections: Essays, Aphorisms, Autobiographical Writings*, Schocken Books, New York, 1986, p. 189. The text of Benjamin's, *The Critique of Violence*, which is more directly contemporaneous with Kelsen's article, "God and the State", refers not to Bakunin, but to the work of Georges Sorel and Erich Unger.

110. H. Kelsen, "God and the State", p. 81.

The pre-figuration of the question of law and life

The methodological anarchism of Kelsen's approach holds that the separation of law from any ground or foundation for law other than law itself is "the indispensable precondition for the development of a genuine science of law, as a *science of positive law* purified of all natural law."¹¹¹ This methodological precondition which operates to confine the science of law to a system of legal norms prefigures the question of the relationship between law and life, which has become a prominent element of contemporary Italian thought concerning the notion of biopolitics.

Kelsen's text prefigures this reflection on biopolitics when the text's methodological procedure is comprehended as a separation of law from life. In this separation, life, as the realm or domain of nature, is accorded a natural, physio-psychological causality, from which only a science of biology or psychology can arise. The science of this natural causality reveals a regularity which cannot provide anything other than a deficient or inauthentic normativity.

Hence, the 'sensuous materialism' of Feuerbach and the 'entirely material being' of Bakunin (*God and the State*) cannot provide, due to their natural foundation, a genuine science of law. For law, from the perspective of legal cognition, cannot be produced by anything other than itself.

The methodological structure, therefore, achieves a double marginalization of the materialism of Bakunin. The science which reproduces the laws of the natural and social world is only recognized insofar as it pertains to the natural world, and its extension to the social world is disqualified. The laws of the social world are only conceivable as a legal science, and, as such, refer to the unity of a legal order, as the "unity of state and law."¹¹² This unity is situated outside any conception of "historical development", and is not dependent upon fulfilment "as a historical fact."¹¹³ Rather, this unity of state and law "must be recognised as a conceptual reality, independent of all historical development."¹¹⁴

The primacy accorded by Kelsen to legal science entails that the further development of Bakunin's notion of science, in *God and the State*, becomes unintelligible. The retrieval of this further development, however, produces a stronger sense of the pre-figuration

111. Ibid., p. 82.

112. Ibid., p. 75.

113. Ibid.

114. Ibid.

of the question of the separation of law and life in Kelsen's text. For Bakunin, science, while expressing, as mental reproduction, the inherent laws of natural and social reality, remains an "ideal reproduction, reflected or mental."¹¹⁵ This "impersonal, general, abstract, insensible" character of science is to be contrasted with "[l]ife."¹¹⁶ It is life which "is wholly fugitive and temporary, but also wholly palpitating with reality and individuality, sensibility, sufferings, joys, aspirations, needs and passions."¹¹⁷ The contrast is also, for Bakunin, the primacy of life over science: "[s]cience creates nothing, it establishes and recognizes only the creations of life."¹¹⁸ This, in turn, accords science the role "to enlighten life, not to govern it."¹¹⁹ Here, Bakunin then requires, for this role of science to be achieved, that "while continuing to concern itself exclusively with general causes, the conditions and fixed relations of individuals and things, it will become one in fact with the immediate and real life of all individuals."¹²⁰

The retrieval of this aspect of Bakunin's conception of science in its relation to life enables Kelsen's methodological approach –legal cognition– to be understood as predicated upon the separation of law from life. It allows the text to be viewed as initiating a path of legal thought which, in its separation of nature and normativity, creates a theory of law, as a hierarchical order of legal norms located, in relation to the human individual, as an external order of constraint/coercion (*Zwangsordnung*). This theory of positive law, as a pure theory of law whose purity rests upon this separation of nature and normativity, finds its preliminary outlines and orientation in Kelsen's "God and the State".

The emphasis upon the presence of Bakunin, as intertext, enables Kelsen's essay to be set within the interpretative perspective of Roberto Esposito's *Bíos*, as a normativism which results in "autonomizing and almost purifying the norm in an obligation always more separate from the facticity of life."¹²¹ However, one should note that, for Esposito, in contrast to the position adopted here, it is Kelsen and Schmitt who represent the two complementary sides –normativism and decisionism– of which the "modern philosophical-juridical debate" is comprised.¹²² The repetition of this "topological contrast" is one in which "politics and law, decision and the norm [...] [are]

115. M. Bakunin, *God and the State*, p. 55.

116. Ibid.

117. Ibid.

118. Ibid.

119. Ibid.

120. Ibid., p. 62.

121. R. Esposito, *Bíos: Biopolitics and Philosophy*, University of Minnesota Press, Minneapolis, 2008, p. 184.

122. Ibid., p. 25.

situated in opposite poles of a dialectic that has as its object the relation between subjects and the sovereign.”¹²³ The interruption of the perpetual repetition between these two poles is effected, for Esposito, by the distinctive break marked by the thought of Michel Foucault; and its further critical development as an affirmative biopolitics in which law and life, normativity and nature, assume an immanent relationship: the norm of life.

The interpretative development and elaboration of this theoretical framework of an affirmative biopolitics, and the specific articulation of a norm of life, which is contained within *Bíos*, is then opened to renewed reflection through the presence of Bakunin, as intertext, in Kelsen’s essay.¹²⁴ This reflection is not intended to indicate that one should simply proceed to the re-adoption of Bakunin’s position as the reintegration of normativism and life. The question of the relationship between law and life requires that, following, Bazzicalupo, one consider “political forms of life.”¹²⁵ One cannot simply assert “bare life before any form”¹²⁶, and the question of form, raises the question of the position of law and its scientificity in relation to that which will provide this form.

123. Ibid.

124. Moreover, one would also have to extend the reflection to encompass Esposito’s subsequent work in *Third Person* and *Living Thought* in order to encompass the wider philosophical parameters of an affirmative biopolitics and its critique of the person (R. Esposito, *Third Person*, Polity Press, Cambridge, 2012 and Id., *Living Thought: The Origins and Actuality of Italian Philosophy*, Stanford University Press, Stanford, 2013).

125. L. Bazzicalupo, “The Ambivalences of Biopolitics”, in *Diacritics*, 36, 2006, p. 114.

126. Ibid.